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17 ALEXA INTERNET, INC. and NIALL
O'DRISCOLL
18

19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 SAN JOSE DIVISION

22 GIRAFI.COM, INC.,

23 Plaintiff,

24 v.

25 ALEXA INTERNET, INC.; NIALL
O'DRISCOLL,

26 Defendants.
27
28

CASE NO. CV 08-2745 RMW

**DECLARATION OF M. ELIZABETH DAY
IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS, TRANSFER OR
STAY**

Date: September 5, 2008
Time: 9:00 am
Dept: 6, 4th Floor
Judge: Honorable Ronald M. Whyte

-1-

1 I, M. Elizabeth Day, declare as follows:

2 1. I am an attorney with the law firm of DLA Piper US LLP, counsel for Defendants
3 Alexa Internet, Inc. and Niall O'Driscoll, in this action. I have personal knowledge of the facts
4 stated herein and if called as a witness, could and would competently testify hereto.

5 2. Alexa Internet, Inc. ("Alexa") filed a complaint against Girafa.com ("Girafa") for
6 patent infringement of U.S. Patent No. 6,282,548 in the United States District Court for the
7 Eastern District of Texas (the "Texas Action") on March 21, 2008. A true and correct copy of
8 Alexa's complaint is attached hereto as Exhibit A.

9 3. Girafa is an Israeli company incorporated in the State of Delaware.

10 4. On June 6, 2008, Girafa filed its answer to the complaint in the Texas Action. In
11 its answer at ¶¶ 5-6, Girafa admits that venue is proper and that Girafa is subject to personal
12 jurisdiction. A true and correct copy of Girafa's answer is attached hereto as Exhibit B.

13 5. Girafa filed its complaint in this action on June 2, 2008. Girafa's complaint seeks
14 declaratory judgment of non-infringement and invalidity and a third cause of action for unfair
15 competition.

16 6. On June 6, 2008, Girafa filed a Motion to Transfer the Texas Action to the
17 Northern District of California. On June 24, 2008, Alexa filed its opposition to the Motion to
18 Transfer. Girafa has elected not to reply to Alexa's opposition as any reply briefing was due to the
19 court on June 30, 2008.

20 7. Attached hereto as Exhibit C is a true and correct copy of print outs from the
21 Judicial Caseload Profile, available at <http://www.uscourts.gov/cgi-bin/cmsd2007.pl>, showing
22 that civil cases in the Eastern District of Texas go to trial 6.9 months earlier than civil cases in the
23 Northern District of California.

24
25 Dated: July 15, 2008

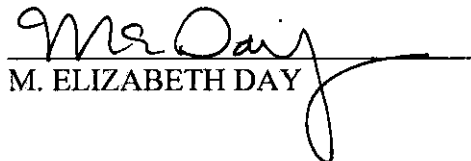

M. ELIZABETH DAY

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

Alexa Internet, Inc.
Plaintiff,

v.

Girafa.com, Inc.
Defendant.

NO. 2:08-cv-121

JURY DEMANDED

PLAINTIFF ALEXA'S PATENT INFRINGEMENT COMPLAINT

Plaintiff Alexa Internet, Inc. ("Alexa"), by its attorneys, for its Complaint against Defendant Girafa.com, Inc. ("Girafa"), alleges as follows:

NATURE OF ACTION

1. This is an action for patent infringement arising under the patent laws of the United States, Title 35, United States Code, Sections 100 *et seq.* and, more particularly, 35 U.S.C. §§ 271 and 281. This action relates to the Defendant's infringement of a patent assigned to Alexa.

PARTIES

2. Plaintiff Alexa is a corporation organized and existing under the laws of California, having its principal place of business at Presidio of San Francisco, Building 37, P.O. Box 29141, San Francisco, California 94129.

3. Defendant Girafa is a corporation organized and existing under the laws of Delaware, having its principal place of business at 1313 North Market Street, Suite 5100, Wilmington, Delaware 19801.

JURISDICTION AND VENUE

4. Plaintiff's claims are made pursuant to the patent laws of the United States, Title 35 U.S.C. §§ 1 *et seq.* This Court has subject matter jurisdiction over these claims pursuant to 28 U.S.C. §§ 1331 and 1338(a).

5. Venue is proper in this district under 28 U.S.C. §§ 1391(a), (b) and/or (c), and 1400(b), as Girafa resides and/or conducts substantial business in this district and has committed, and is continuing to commit, acts of infringement in this district.

6. Girafa is subject to personal jurisdiction in this judicial district because it is doing business in this judicial district, directly and/or through third parties, by selling, offering to sell, and otherwise making available its products and services, including at the "<http://www.girafa.com>" web page.

GENERAL ALLEGATIONS

7. United States Patent No. 6,282,548 ("the '548 patent"), entitled "Automatically Generate and Displaying Metadata as Supplemental Information Concurrently with the Web Page, There Being No Link Between Web Page and Metadata" was duly and legally issued by the United States Patent and Trademark Office to inventors Michael G. Burner *et al.* on August 28, 2001. A true and correct copy of the '548 patent is attached hereto as Exhibit A.

8. The '548 patent has been assigned to Alexa who is its current owner with sole rights to sue and recover damages and otherwise enforce the '548 patent.

9. Girafa makes, uses, sells, offers for sale in the United States, and/or imports into the United States, directly or through third parties, computer-related products and services, including without limitation, its Girafa Toolbar and Girafa Thumbnail Service, that infringe the '548 patent.

FIRST CAUSE OF ACTION
INFRINGEMENT OF THE '548 PATENT

10. Plaintiff refers to and incorporates paragraphs 1 through 9, as though fully set forth herein.

11. Girafa has been and is still is infringing literally and/or under the doctrine of equivalents one or more claims of the '548 patent pursuant to 35 U.S.C. § 271(a) by making, using, selling, offering to sell in the United States, and/or importing into the United States, directly or through third parties, computer-related products and services, including without limitation, its Girafa Toolbar and Girafa Thumbnail Service, that infringe the '548 patent.

12. By reason of Girafa's acts alleged herein, Plaintiff has suffered, is suffering, and, unless such acts are enjoined by the Court, will continue to suffer injury to its business and property rights, for which it is entitled to damages pursuant to 35 U.S.C. § 284 in an amount to be proved at trial.

13. By reason of Girafa's acts alleged herein, Plaintiff has suffered, is suffering, and, unless such acts are enjoined by the Court, will continue to suffer irreparable harm for which there is no adequate remedy at law, and for which Plaintiff is entitled to preliminary and/or permanent injunctive relief pursuant to 35 U.S.C. § 283.

SECOND CAUSE OF ACTION
INDUCED INFRINGEMENT OF THE '548 PATENT

14. Plaintiff refers to and incorporates paragraphs 1 through 13 as though fully set forth herein.

15. Plaintiff is informed and believes and thereon alleges that Girafa has been and still is inducing others to infringe one or more claims of the '548 patent pursuant to 35 U.S.C. §

271(b) and/or (f) by making, using, selling, offering to sell in the United States, and/or importing into the United States, directly or through third parties, computer-related products and services, including without limitation, its Girafa Toolbar and Girafa Thumbnail Service, that infringe the '548 patent.

16. Plaintiff has suffered, is suffering, and, unless such acts are enjoined by the Court, will continue to suffer injury to its business and property rights, for which it is entitled to damages pursuant to 35 U.S.C. § 284 in an amount to be proved at trial.

17. By reason of Girafa's acts alleged herein, Plaintiff has suffered, is suffering, and, unless such acts are enjoined by the Court, will continue to suffer irreparable harm for which there is no adequate remedy at law, and for which Plaintiff is entitled to preliminary and/or permanent injunctive relief pursuant to 35 U.S.C. § 283.

**THIRD CAUSE OF ACTION
CONTRIBUTORY INFRINGEMENT OF THE '548 PATENT**

18. Plaintiff refers to and incorporates paragraphs 1 through 17 as though fully set forth herein.

19. Girafa has been and is still contributorily infringing one or more claims of the '548 patent pursuant to 35 U.S.C. § 271(c) by making, using, selling, offering to sell in the United States, and/or importing into the United States, directly or through third parties, computer-related products and services, including without limitation, its Girafa Toolbar and Girafa Thumbnail Service, that infringe the '548 patent.

20. By reason of Girafa's acts alleged herein, Plaintiff has suffered, is suffering, and, unless such acts are enjoined by the Court, will continue to suffer injury to its business and

property rights, for which it is entitled to damages pursuant to 35 U.S.C. § 284 in an amount to be proved at trial.

21. By reason of Girafa's acts alleged herein, Plaintiff has suffered, is suffering, and, unless such acts are enjoined by the Court, will continue to suffer irreparable harm for which there is no adequate remedy at law, and for which Plaintiff is entitled to preliminary and/or permanent injunctive relief pursuant to 35 U.S.C. § 283.

RESERVATION OF RIGHTS

22. Alexa reserves its right to amend its Complaint to include additional facts and claims, including, but not limited to, Girafa's willful infringement, should facts learned during discovery support any such additional facts and claims.

PRAYER

WHEREFORE, Alexa respectfully request the following relief:

(a) That Plaintiff be adjudged the owner of the '548 patent and entitled to all rights of recovery thereunder, and that such patent is valid and enforceable;

(b) That Girafa be adjudged to have infringed, induced infringement, and/or contributed to infringement of the '548 patent;

(c) That Girafa, its officers, principals, agents, attorneys, servants, and employees, and all others acting under their direction and authority, and their successors and assigns, be enjoined by preliminary and permanent injunctions from infringement, inducement of infringement, and contributory infringement of the '548 patent;

(d) That Plaintiff be awarded all damages adequate to compensate it for Girafa's infringement of the '548 patent, such damages to be determined by a jury, including pre-judgment and post-judgment interest;

(e) That this case be declared an exceptional case within the meaning of 35 U.S.C. § 285 and that Plaintiff be awarded the attorney fees, costs, and expenses that it incurs prosecuting this action; and

(f) That Plaintiff be given such other and further relief as this Court deems just and proper.

REQUEST FOR TRIAL BY JURY

Alexa respectfully requests that all issues triable be tried by and before a jury.

Dated: March 21, 2008

Respectfully Submitted,

/s/ Charles Ainsworth

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Attorneys for Alexa Internet, Inc.

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

ALEXA INTERNET, INC.,

Plaintiff,

v.

GIRAFA.COM, INC.

Defendant.

Case No.: 2:08-cv-121

**DEFENDANT GIRAFA.COM, INC.'S
ANSWER TO ALEXA INTERNET, INC.'S COMPLAINT**

Defendant Girafa.com, Inc. ("Girafa"), by its attorneys, hereby answers to the allegations in the Complaint of Alexa Internet, Inc. ("Alexa").

NATURE OF ACTION

1. Girafa admits that the Complaint purports to set forth an action under the patent laws of the United States, but denies the allegation that Defendant has infringed the asserted patent.

PARTIES

2. On information and belief, Girafa admits that Alexa is organized and existing as alleged.
3. Girafa admits the assertion of this paragraph.

JURISDICTION AND VENUE

4. Girafa admits that this Court has subject matter jurisdiction over the asserted claims.
5. Girafa denies that it resides and/or conducts substantial business in this district, and that

it has committed and is continuing to commit, acts of infringement in this district, but admits that venue is proper.

6. Girafa denies that it is doing business in this judicial district, but admits that it is subject to personal jurisdiction.

GENERAL ALLEGATIONS

7. Girafa is without sufficient information to admit or deny this assertion, and therefore denies it.
8. Girafa is without sufficient information to admit or deny this assertion, and therefore denies it.
9. Girafa denies this assertion.

FIRST CAUSE OF ACTION

10. Girafa refers to and incorporates paragraphs 1 through 9, as though fully set forth herein.
11. Girafa denies this assertion.
12. Girafa denies this assertion.
13. Girafa denies this assertion.

SECOND CAUSE OF ACTION

14. Girafa refers to and incorporates paragraphs 1 through 13, as though fully set forth herein.
15. Girafa denies this assertion.
16. Girafa denies this assertion.
17. Girafa denies this assertion.

THIRD CAUSE OF ACTION

18. Girafa refers to and incorporates paragraphs 1 through 17, as though fully set forth herein.
19. Girafa denies this assertion.
20. Girafa denies this assertion.
21. Girafa denies this assertion.

RESERVATION OF RIGHTS

22. Girafa admits that Alexa purports to reserve rights in this paragraph, but denies that Girafa has willfully infringed, and denies that Alexa is entitled to reserve any such rights.

RESPONSE TO ALEXA'S PRAYER FOR RELIEF

23. Girafa denies that Alexa is entitled to the relief it has requested in its Prayer.

REQUEST FOR TRIAL BY JURY

24. This paragraph states only legal request, and thus, no response is required.

DEFENSES

25. As and for its defenses, Girafa alleges as follows:

First Defense -Failure to State a Claim

26. The Complaint fails to state a claim upon which relief can be granted.

Second Defense -Noninfringement

27. Girafa does not infringe and has not infringed, either directly, indirectly, contributorily, or by inducement, or in any other way, any claim of the '548 patent, either literally or under the doctrine of equivalents, willfully or otherwise.

Third Defense -Patent Invalidity

28. The '548 patent is invalid for failure to comply with the requirements of Title 35, United States Code, including but not limited to Sections 101-103, and/or 112.

Exceptional Case

29. This is an exceptional case entitling Girafa to an award of its attorneys fees incurred in connection with this action pursuant to 35 U.S.C. § 285.

RELIEF

WHEREFORE, Girafa seeks the following relief:

- a. That judgment be entered in favor of Girafa and against Alexa on Alexa's Complaint;
- b. That Alexa take nothing by its Complaint and that Alexa's Complaint be dismissed with prejudice;
- c. That each and every claim of the '548 patent be declared not infringed, invalid, and/or unenforceable;
- d. That pursuant to 35 U.S.C. § 285 and/or other applicable laws, this action be found to be an exceptional case and that Girafa be awarded its attorneys' fees incurred in connection with this action;
- e. That Girafa be awarded its cost of suit incurred herein; and
- f. That Girafa be granted such other and additional relief as this Court deems just and proper.

DATED: June 6, 2008

CAPSHAW DeRIEUX, LLP

/s/ S. Calvin Capshaw

S. Calvin Capshaw

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A) on this 6th day of June, 2008.

/s/ S. Calvin Capshaw

S. Calvin Capshaw

EXHIBIT C

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

				12-MONTH PERIOD ENDING SEPTEMBER 30							
CALIFORNIA NORTHERN				2007	2006	2005	2004	2003	2002	Numerical Standing	
OVERALL CASELOAD STATISTICS	Filings*			7,970	8,683	6,362	6,727	6,919	7,887	U.S.	Circuit
	Terminations			6,777	6,983	6,966	6,471	7,094	6,675		
	Pending			9,005	8,157	6,557	7,267	7,567	7,958		
	% Change in Total Filings	Over Last Year		-8.2						79	15
		Over Earlier Years			25.3	18.5	15.2	1.1	35	5	
Number of Judgeships				14	14	14	14	14	14		
Vacant Judgeship Months**				.0	.0	.0	.0	3.1	12.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	569	620	455	480	494	563	15	4	
		Civil	505	558	390	413	424	510	8	2	
		Criminal Felony	33	37	39	44	47	42	86	14	
		Supervised Release Hearings**	31	25	26	23	23	11	28	10	
	Pending Cases			643	583	468	519	541	568	12	2
	Weighted Filings**			624	621	543	581	631	598	8	2
	Terminations			484	499	498	462	507	477	30	7
	Trials Completed			8	8	10	10	11	11	92	14
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	12.4	11.2	12.6	11.1	11.7	11.8	82	14	
		Civil**	6.7	7.4	9.8	8.2	10.6	9.5	11	2	
	From Filing to Trial** (Civil Only)			24.9	25.0	28.0	22.5	30.3	23.5	46	7
OTHER	Civil Cases Over 3 Years Old**	Number	393	528	530	430	377	475			
		Percentage	4.7	7.3	9.5	6.9	5.7	6.7	51	5	
	Average Number of Felony Defendants Filed Per Case			1.2	1.5	1.5	1.4	1.5	1.4		
	Jurors	Avg. Present for Jury Selection	53.81	59.09	55.21	61.19	65.00	66.42			
		Percent Not Selected or Challenged	41.9	43.2	31.0	48.9	40.9	47.2			

2007 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	7074	122	975	1610	94	44	534	527	243	533	732	422	1238
Criminal*	455	6	72	162	40	64	11	38	5	6	16	15	20

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.

** See "Explanation of Selected Terms."

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

					12-MONTH PERIOD ENDING SEPTEMBER 30							
TEXAS EASTERN					2007	2006	2005	2004	2003	2002	Numerical Standing	
OVERALL CASELOAD STATISTICS	Filings*				3,873	3,658	3,583	3,860	4,072	3,610	U.S.	Circuit
	Terminations				3,572	3,623	3,538	4,243	3,487	4,458		
	Pending				3,352	3,079	3,035	2,983	3,358	2,825		
	% Change in Total Filings	Over Last Year			5.9						19	2
		Over Earlier Years			8.1	.3	-4.9	7.3		19	3	
Number of Judgeships					8	8	8	8	8	7		
Vacant Judgeship Months**					.0	.0	.0	9.1	4.2	19.3		
ACTIONS PER JUDGESHIP	FILINGS	Total	484	457	448	483	509	515	31	5		
		Civil	403	375	376	411	431	444	17	3		
		Criminal Felony	81	82	72	71	77	70	36	3		
		Supervised Release Hearings**	0	0	0	1	1	1	-	-		
	Pending Cases				419	385	379	373	420	404	30	6
	Weighted Filings**				674	550	511	518	529	492	5	2
	Terminations				447	453	442	530	436	637	41	7
	Trials Completed				18	21	21	21	26	22	55	7
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	8.7	9.2	8.3	8.4	7.5	8.9	47	5		
		Civil**	9.0	9.0	10.3	6.5	10.9	15.0	42	5		
	From Filing to Trial** (Civil Only)			18.0	17.7	15.9	15.4	17.0	14.0	14	2	
OTHER	Civil Cases Over 3 Years Old**	Number	41	80	64	47	41	58				
		Percentage	1.5	3.2	2.6	1.9	1.4	2.4	9	2		
	Average Number of Felony Defendants Filed Per Case				1.8	1.6	1.7	1.7	1.7	1.4		
	Jurors	Avg. Present for Jury Selection	40.26	36.89	34.27	33.92	32.49	32.40				
		Percent Not Selected or Challenged	35.5	30.1	30.2	32.5	33.5	33.3				

2007 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	3222	128	181	1379	30	20	75	401	252	409	220	3	124
Criminal*	648	18	185	55	168	90	24	30	10	25	11	11	21

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.

** See "Explanation of Selected Terms."